**APPENDIX A**

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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Nos. 94-1998 and 94-2103

ARSENIA TOLENTINO,

*Plaintiff-Appellee*
*and Cross-Appellant,*

v.

LAWRENCE FRIEDMAN,

*Defendant-Appellant*
*and Cross-Appellee.*

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Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 93-C-878-**Charles R. Norgle, Sr.,** *Judge.*

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ARGUED NOVEMBER 3, 1994-
DECIDED JANUARY 31, 1995

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Before COFFEY, PRATT,* and FLAUM, *Circuit Judges.*
PRATT, *Circuit Judge*:

* The Honorable George C. Pratt, United States Circuit Judge for the Second Circuit, Sitting by designation.

*FACTS AND BACKGROUND*

In this action under the Fair Debt Collection and Practices Act, 15 U.S.C. § 1692-1692o ("FDCPA"), the parties cross-appeal from a judgment entered in the United States

District Court, Northern District of Illinois, *Judge* Charles R. Norgle, Sr. Friedman's appeal challenges the determination of liability and claims the attorney's fees awarded to plaintiff were excessive; Tolentino's cross-appeal claims that the attorney's fees awarded to her were inadequate.

Friedman is a practicing attorney in Chicago, Illinois; his practice involves debt collection on behalf of creditors. After a creditor hires him to collect a debt, Friedman begins pre-litigation communication with the debtor in an attempt to collect the sum owed. These attempts normally include written correspondence.

In 1992, Citicorp National Services ("Citibank") employed Friedman to collect an alleged deficiency on an auto loan owed by Tolentino. As part of his pre-litigation communication, Friedman sent a letter to Tolentino in the following form:

19 South LaSalle Street
Tenth Floor
Chicago Illinois 60603

Law Offices
Lawrence Friedman

RE:
Amount claimed:
Account number:

Please be advised that I have been retained by the above named, to represent them in their claim against you.

Be further advised that I have been instructed to initiate all necessary action in the enforcement of this claim, but before doing so, I am giving you this opportunity to pay this indebtedness without the necessity of filing suit.

If, however, I do not hear from you I may have no alternative but to commence legal action against you, which will greatly increase the amount due thereunder, by the addition of court costs and attorney fees, where applicable.

Unless you the recipient of this notice, within thirty days after receipt dispute validity of this debt or any portion thereof, the debt will be assumed to be valid.

If you notify the office of the undersigned, in writing within the thirty day period of the debt, or any portion there is disputed, this office will obtain verification of the debt or a copy of a judgment against you and a copy of such verification of judgment will be mailed to you by the undersigned.

Upon your written request within the thirty day period, this office will provide you with the name and address of the original creditor if different from the current creditor.

This letter is an attempt to collect a debt and any information obtained may be used for that purpose.

Very Truly Yours,

LAWRENCE FRIEDMAN

Written in at the beginning of the letter were the name of the creditor, Citibank; the amount of the debt; and the identity of the debtor Tolentino, and her account number.

When Tolentino still did not pay the debt, Friedman, on behalf of Citibank, filed a suit against her on September 4, 1992, in Cook County Circuit Court. After delivery of the summons and complaint to the sheriff, but before process had been served, Friedman mailed to Tolentino a "courtesy copy" of the documents in an envelope bearing the return address of Friedman's law firm. In the envelope, separately folded, he included an additional document. That document, which gives rise to this lawsuit, read as follows:

***IMPORTANT NOTICE***

> In the next few days it is likely that you will receive mail from lawyers recommending that the only way you clean up your financial affairs is to file BANKRUPTCY, and that you employ that lawyer to represent you.
>
> As you know CREDIT is extremely important in this day and age. Filing bankruptcy is not necessarily the end to your financial problems. It might cause more problems than it solves. Bankruptcy may also involve COSTS to you such as filing, trustee and attorney fees.

Your failure to pay this indebtedness to this creditor has prompted the filing of this legal proceeding against you. Though this action is unfortunate, it does not hinder your ability to discuss the payment of this debt on terms that everyone can live with.

Please contact this office to discuss a repayment arrangement in line with your financial situation. Please note that this office only represents the creditor and we cannot represent your interest in this matter.

Law Offices
LAWRENCE FRIEDMAN - 03532
19 S. LaSalle Street
10th Floor
Chicago, IL 60603
(312) 977-8000

No other documents were included in the envelope.

Tolentino brought this actions against Friedman seeking damages in the United States District Court for the Northern District Illinois, for violations of the Fair Debt Collection Practice Act, 15 U.S.C. § 1692. Both Tolentino and Friedman moved for summary judgment. Tolentino claimed that Friedman, acting as a debt collector, violated the FDCPA, specifically 15 U.S.C. § 1692e, by mailing to her the "IMPORTANT NOTICE". Friedman claimed that the "IMPORTANT NOTICE" was part of his litigation efforts and therefore not covered by the FDCPA, but that in any event he had not violated the act.

The district court rejected his litigation-effort defense and ruled that the "notice" had violated subsections (9), (10), (11), and (13) of §1692e, which read in relevant part:

> A debt collection may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt * * * The following conduct is a violation of this section:
>
> (9) The use or distribution of any written communication which stimulates or is falsely represented to be a document authorized, issued or approved by any court, official, or agency of the United States, or which creates a false impression as to its source, authorization or approval.
>
> (10) The use of any false representation or deceptive means to collect or attempt to collect any debt to obtain information concerning a consumer.
>
> (11) [T]he failure to disclose clearly in all communications made to collect a debt . . . that the debt collector is attempting to collect a debt and that any information obtained will be used for that purpose.
>
> * * *
>
> (13) The false representation that documents are legal process.

The district court found that the "IMPORTANT NOTICE" had violated all of these provisions, because:

> Friedman's Notice deceptively and misleadingly impresses upon its readers the belief that, because a lawsuit has been filed, they are now in a dire situation in which bankruptcy may appear to be the only available option. * * * Last, the Notice fails to disclose clearly that Friedman is attempting to collect a debt by this mailing and does not state that the information obtained will be used for that purpose. *See* 15 U.S.C. § 1692(e)(11).

*Tolentino v. Friedman*, 833 F. Supp. 697, 700-701 (N.D. Ill. 1993).

The district court entered judgment in favor of Tolentino for $1,000, the maximum amount of individual damages permitted by the statute, under § 1692k(a)(3), as well as $553.43 costs, and $10,132.50 attorney's fees.

Friedman appeals and Tolentino cross-appeals.

## *DISCUSSION*

### A. *Summary Judgment*

This court reviews a district court's grant of summary judgment *de novo*. *Cincinnati Ins. Co. v. Flanders Elec. Motor Serv.*, 1994 U.S. App. LEXIS 30991, *8 (7th Cir. 1994). In determining whether summary judgment is appropriate, all evidence and all inferences that can be drawn from the evidence are viewed in a light most favorable to the nonmoving party. *Id.* Summary judgment is not granted unless there are no triable issues. *Bechtold v. Physicians Health Plan of Northern Indiana, Inc.*, 28 F.3d 666, 671 (7th Cir. 1994).

On the main appeal, Friedman claims (1) that the FDCPA is not applicable to his "Important Notice", because he sent it as an attorney involved in the litigation phase of collecting debts for Citibank; (2) that his status as a lawyer distinguishes him from a debt-collector, who is always subject to the provisions of the FDCPA; (3) that the "IMPORTANT NOTICE" was simply a "follow-up" letter to which the disclosure requirements of § 1692e(11) do not apply; and (4) that an average consumer would have no difficulty recognizing that the "IMPORTANT NOTICE" is not a court document but simply a communication from Citibank's counsel. *See Green v. Hocking*, 9 F.3d 18 (6th Cir. 1993); *Pressley v. Capital Credit & Collection Service*, 760 F.2d 922 (9th Cir. 1985).

Friedman also contends that the attorney's fees awarded by the district court were duplicative and excessive and that the district court, in awarding them, abused its discretion. Tolentino argues on the cross-appeal that the district court abused its discretion by awarding attorney's fees at less than the prevailing market rate.

Friedman has stipulated that he is a debt collector within the meaning of the FDCPA. His principal contention

is that once he started the litigation, the act no longer applied to him. Our review, therefore, hinges, in large measure, on whether or not Friedman, in his capacity as lawyer involved in debt collection, is subject to the FDCPA after litigation has commenced. *Heintz v. Jenkins*, 25 F.3d 536 (7th Cir. 1994), *cert. granted*, 115 S. Ct. 416 (1994), specifically addressed this question. There, the district court held that congress did not intend to regulate normal legal proceedings under the FDCPA; however, we reversed. We noted that the FDCPA in § 1692a(6) regulates the activities of a debt collector, which is defined as:

> Any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collects directly or indirectly, debts owed or due or asserted to be owed or due another.

*Jenkins*, 25 F.3d at 538. We specifically concluded:

> Nothing in this definition hints that attorneys in the course of litigation should be excluded. Therefore, if a plaintiff can demonstrate that an attorney fits within the rubrics of the statutory definition of "debt collector", then that attorney's conduct is regulated.

Since Friedman has stipulated that he is a "debt collector" within the meaning of the act, *Jenkins* requires us to hold that his conduct, even during the course of litigation, is regulated. *Id.*

Friedman's reliance on *Green v. Hocking*, 9 F.3d 18 (6th Cir. 1993), which held that the filing of a complaint for collection of a debt was the practice of law and not subject to the FDCPA, is misplaced, because *Green* is not the law in the circuit; we are bound by *Jenkins*. Of course, the Supreme Court has now granted certiorari in *Jenkins* and may ultimately determine this issue differently. If and when that happens, Friedman may still have suitable remedies available from any change the Supreme Court may make in the rule.

We turn then to consider whether Friedman's "IMPORTANT NOTICE" subjects him to liability under § 1692e, which was enacted "to prevent 'abusive, deceptive, and unfair debt collection practices'". *Pipiles v. Credit Bureau of Lockport*, 886 F.2d 22, 27 (2d Cir. 1989) (citations omitted). Section 1692e first provides: "A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt". Then, "without limiting the general application of the foregoing", it describes in 16 subsections specific conduct that violates the statute.

Subsection (11) seeks to prevent communications from a debt collector that appear to be official communications, rather than attempts to collect a debt. Friedman's "IMPORTANT NOTICE" clearly violated the plain language of this subsection, which provides:

> (11) * * * the failure to disclose clearly in all communications * * * that the debt collector is attempting to collect a debt and that any information obtained will be used for that purpose.

15 U.S.C. § 1692e(11).

While Friedman's pre-litigation letter did contain the warning required by subsection (11), it is undisputed that the warning was not repeated in the "IMPORTANT NOTICE", and that the omission was not inadvertent.

Friedman contends that the debt collection warning is not required in follow-up letters because they are not "communications" covered by FDCPA. He relies on *Pressley v. Capital Credit Services, Inc.*, 760 F.2d 922 (9th Cir. 1985), where the ninth circuit held "that the follow up notice sent in this case is not a 'communication' within which the disclosure required by 15 U.S.C. § 1692(e)(11) must be made". *Id.* at 925.

We disagree with that conclusion and hold that subsection (11) applies to "*all* communications made to collect a debt * * * *" (emphasis added). The FDCPA defines "communication" as "the conveying of information regarding a debt directly or indirectly to any person through any medium". 15 U.S.C. § 1692(a)(2). While Friedman's "IMPORTANT NOTICE", which obviously relates to the alleged debt, states, "Please contact this office to discuss a repayment arrangement * * *", Friedman nevertheless failed to write on the "IMPORTANT NOTICE" that he was attempting to collect Tolentino's debt and that any information provided would be used for that purpose. He therefore violated the subsection.

Several courts of appeals have also rejected the *Pressley* decision and held that the debt collection warning must be contained in "all" communications. The second circuit held that the balancing analysis applied in *Pressley* is precluded by clear statutory language. *Pipiles*, 886 F.2d at 26-27. The court elaborated:

> First, in providing that "all communications" contain the required disclosures, Congress appears to have precluded the "balancing" suggested in *Pressley*. Were balancing undertaken, allowing certain communications to omit the disclosure, the clear and unambiguous language to "*all* communications" would effectively be changed to "*some* communications." Second, it is apparent that the prescribed requirement can further the Congressional purpose in enacting the FDCPA in 1977, which was to prevent "abusive, deceptive, and unfair debt collection practices." 15 U.S.C. § 1692 (1982). In fact, this case demonstrates the utility of the statute. By requiring disclosure in all communications, Congress has ensured that even if the first letter is not received by the consumer, as Pipiles claims occurred here, subsequent notices will nonetheless provide the consumer with the requisite disclosure. Third, even if there were little discernible purpose in repetition, Congress could exercise its legislative judgment to adopt a reasonable margin of safety to insure its remedial goal. We are not at liberty to substitute a view different from that expressed by Congress in the legislative enactment.

Similarly, in *Carroll v. Wolpoff & Abramson*, 961 F.2d 459 (4th Cir. 1992), the fourth circuit stated:

> In our view, the language "all communications" in section 1692(3)(11) is clear and unambiguous. It makes no

> distinction between initial and subsequent communications * * * * Consumers sometimes do not receive first notices, and thus follow-up letters may often provide them with their first notice of the debt collection process. In our view, it follows that requiring the disclosure requirements of Section 1692(e)(11) in the follow-up letters furthers congressional intent to prevent the abuse of debtors.

*Carroll*, 961 F.2d at 461.

The third and sixth circuits have also followed the second circuit in rejecting *Pressley*. *See Dutton v. Wolpoff & Abramson*, 5 F.3d 649 (3d Cir. 1993); *Frey v. Gangwish*, 970 F.2d 1516 (6th Cir. 1992).

We agree that the language of the statute is clear and we, too, reject the ninth circuit's positions as expressed in *Pressley*. We therefore affirm the summary judgment based on Friedman's violation of § 1692e(11).

While we have serious reservations as to whether summary judgment is appropriate as to subsections (9), (10), and (13) because of triable issues that are presented there, we need not address those issues, since we are affirming summary judgment based on subsection (11), and, in the circumstances of this appeal, it does not matter whether the same notice contained additional violations.

In awarding damages when an action is brought by an individual under the FDCPA, the court is to award actual damages plus "such additional damages as the court may allow, but not exceeding $1,000 * * * *" 15 U.S.C. § 1692k(a)(1), (a)(2)(A). As the district court noted, Tolentino

has suffered no actual damages and sought only statutory damages. In assessing whether part or all of the $1,000 statutory damages shall be awarded, the court generally is to consider "the frequency and persistence of noncompliance by the debt collector, the nature of such noncompliance, and the extent to which such noncompliance was intentional * * * *" *Id.* at § 1692k(b)(1). No such assessment was necessary here, however, because Friedman did not contest the maximum amount in response to the motion for summary judgment, nor did he claim that his noncompliance was unintentional and the result of a bona fide error within the meaning of 15 U.S.C. § 1692(c). The effect of Friedman's position in the district court means that since summary judgment against him on subsection (11) was proper, the award of $1,000 must be affirmed, and there is no need to consider the possible violations of the other subsections.

B. *Attorney's Fees.*

The FDCPA provides for an award of costs and attorney's fees to the successful consumer.

> [A]ny debt collector who fails to comply with any provision of this title with respect to any person is liable to such person in an amount equal to the sum of---
>
> * * *
>
> (3) in the case of any successful action to enforce the foregoing liability, the costs of the

> action, together with a reasonable attorney's fee as determined by the court.

15 U.S.C. § 1692(k)(a). The statutory language makes an award of fees mandatory. "Because the FDCPA was violated * * * the statute requires the award of costs and a reasonable attorney's fee * * *" *Pipiles*, 886 F.2d at 28.

The reason for mandatory fees is that congress chose a "private attorney general" approach to assume enforcement of the FDCPA.

> Given the structure of the section, attorney's fees should not be construed as a special or discretionary remedy; rather, the act mandates an award of attorney's fees as a means of fulfilling Congress's intent that the Act should be enforced by debtors acting as private attorney's general.

*Graziano v. Harrison*, 950 F.2d 107, 113 (3d Cir. 1991).

"Unlike most private tort litigants, [a plaintiff who brings an FDCPA action] seeks to vindicate important * * * rights that cannot be valued solely in monetary terms", *City of Riverside v. Rivera*, 106 S. Ct. 2686, (1986), and congress has determined that the public as a whole has an interest in the vindication of the statutory rights. *Id.*

The district court found that Tolentino's counsel normally received rates of $275 per hour for Mr. Edelman and $225 per hour for Combs. The record shows that other courts have awarded fees at those rates in similar types of

cases. However, Judge Norgle held that these rates should be reduced in FDCPA cases because

> [f]ew paying clients would be inclined to pay voluntarily an hourly rate of $275 to seek damages not exceeding $1,000 * * * There is no dispute in the right case and under the appropriate circumstances, counsel for plaintiff's fee would be reasonable at the rate of $275 hourly, as indicated in counsel's supplemental affidavit. But not in this case, as the court has previously ruled.

The Supreme Court has explained the calculation for an award of attorney's fees:

> The most useful starting point for determining the amount of a reasonable fee is the number of hours reasonable expended on the litigation multiplied by a reasonable hourly rate. The calculation provides an objective basis on which to make an initial estimate of the value of a lawyer's services.

*Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983)

There are several factors that a court should consider when calculating attorney's fees, including (1) the time and labor required; (2) the novelty and difficulty of the question; (3) the skill requisite to perform the legal service properly; (4) the preclusion of employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) any time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and

ability of the plaintiff's attorney; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. *Id.* at 441.

The Supreme Court has also stated:

> "[T]he degree of the plaintiff's overall success goes to the reasonableness" of a fee award under *Hensley v. Eckerhart*. Indeed, "the most critical factor" in determining the reasonableness of a fee award "is the degree of success obtained." *Hensley*.

*Farrar v. Hobby*, 113 S. Ct. 566, 574 (1992).

Tolentino contends that the district court abused its discretion by not awarding attorney's fees at her normal hourly rate. Tolentino does not, however, object to the reduction in the number of hours expended. Friedman, on the other hand, claims that the district court's award of fees was excessive.

In order to encourage able counsel to undertake FDCPA cases, as congress intended, it is necessary that counsel be awarded fees commensurate with those which they could obtain by taking other types of cases. As we noted in *Gusman v. Unisys Corp.*, 986 F.2d 1146, 1150 (7th Cir. 1993),

> Our recent cases have stressed that the best measure of the cost of an attorney's time is what that attorney could earn from paying clients. For a busy attorney, this is the standard hourly rate. If he were not

> representing this plaintiff in this case, the lawyer could sell the same time to someone else. That other person's willingness to pay establishes the market's valuation of the attorney's services.
>
> The Third Circuit has similarly stated:
>
> Congress provided fee shifting to enhance enforcement of important civil rights, consumer-protection, and environmental policies. By providing competitive rates we assure that attorneys will take such cases, and hence increase the likelihood that the congressional policy of redressing public interest claims will be vindicated.

*Student Public Interest Research Group v. AT & T Bell Laboratories*, 842 F.2d 1436, 1449 (3d Cir. 1989).

Here, Tolentino prevailed on summary judgment, thereby protecting her rights under the statute, and has recovered the maximum statutory damages allowed to an individual plaintiff. Under *Farrar*, therefore, Tolentino has obtained a high degree of success.

Paying counsel in FDCPA cases at rates lower than those they obtain in the marketplace is inconsistent with the congressional desire to enforce the FDCPA through private actions, and therefore misapplies the law. *Florin v. Nationsbank of Georgia*, N.A., 34 F.3d 560, 562-63 (7th Cir. 1994).

*CONCLUSION*

The summary judgment that the "IMPORTANT NOTICE" violated § 1692(e)(11) of the FDCPA is affirmed. Plaintiff is entitled to statutory damages of $1,000 plus $553.43 in costs. The district court's award of attorney's fees is reversed and the case is remanded to the district court to fix an appropriate attorney's fees award in light of this opinion.

A true Copy:

Teste:

*Clerk of the United States Court of Appeals for the Seventy Circuit*

**APPENDIX B**

Arsenia TOLENTINO, Plaintiff,

v.

Lawrence FRIEDMAN, Defendant.

Nelwin BREWER and Johnnie Mae Johnson, individually and on behalf of all others similarly situated, Plaintiffs,

v.

Lawrence FRIEDMAN, d/b/a Law Offices, Lawrence Friedman, Defendant.

Nos. 93 C 878, 93 C 971.

United States District Court, N.D. Illinois, E.D.

Sept. 21, 1993.

*OPINION AND ORDER*

NORGLE, District Judge:

Before the court are cross-motions for partial summary judgment. For the following reasons, the court grants the plaintiffs' motions and denies defendant's motion.

*FACTS*

The defendant in these two consolidated cases, Lawrence Friedman ("Friedman"), is a practicing attorney maintaining a sole proprietorship in Chicago, Illinois. At least a part of Friedman's practice includes the representation of creditors in their efforts to recover debts allegedly owed. These two cases arose from the debt collection practices of Friedman; one case was filed as a class action[3] and the other individually.

Sometime in 1992, Citicorp National Services Inc. ("Citicorp") hired Friedman to recover an alleged deficiency on an automobile lease that Citicorp claimed plaintiff Arsenia Tolentino ("Tolentino") owed. Also in 1992, F.C.C. National Bank ("F.C.C.") hired the services of Friedman in order to recover monies allegedly owed by Nelwin Brewer ("Brewer"), and Discover Card Services, Inc. ("Discover Card") hired Friedman to recover monies from Johnnie Mae Johnson ("Johnson"). Friedman sent collection letters to these individuals which read:

> Please be advised that I have been retained by the above named, to represent them in their claim against you.
>
> Be further advised that I have been instructed to initiate all necessary action in the

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[3]Because the court wanted to address the liability issue in this case quickly, the briefing on class certification has been stayed pending the resolution of these motions.

enforcement of the claim, but before doing so, I am giving you this opportunity to pay this indebtedness without the necessity of filing suit.[4]

If, however, I do not hear from you I may have no alternative but to commence legal action against you, which will greatly increase the amount due hereunder, by the addition of court costs and attorney fees, where applicable.

Unless you, the recipient of this notice, within thirty days after receipt dispute the validity of this debt or any portion thereof, the debt will be assumed to be valid.

If you notify the office of the undersigned, in writing within the thirty-day period that the debt, or any portion there is disputed, this office will obtain verification of the debt or a copy of a judgment against you and a copy of

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[4]Although the parties do not raise any issue as to the legality of Friedman's letter, the court notes that the language in this letter is rather misleading. For instance, taken literally, the sentence footnoted implies that the debt can be payed without requiring the *debtor* to file suit.

> such verification of judgment[5] will be mailed to you by the undersigned.
>
> Upon your written request within the thirty day period, this office will provide you with the name and address the original creditor if different from the current creditor.
>
> This letter is an attempt to collect a debt and any information obtained may be used for that purpose.

Tolentino refused to pay the purported debt, claiming it was illegal and unenforceable, and also filed suit against Citicorp alleging violations of various consumer protection laws. Brewer and Johnson also refused to pay their alleged debts.

On September 4, 1992, Friedman filed a complaint against Tolentino on behalf of Citicorp and on September 10,

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[5]This sentence provides an additional illustration of the possible confusion caused by the words used in this letter. The words "verification of [sic] judgment" add more confusion to the footnoted sentence. This sentence first distinguishes between a verification of a debt and a copy of a judgment; but now, with the use of the word "of" instead of "or," it seems to combine the two ideas. This sentence could also be misleading to a debtor because it implies there may already exist a judgment against the debtor; the form letter does not differentiate between a judgment debtor and another debtor.

1992, filed suit against Brewer on behalf of F.C.C. Johnson was sued on September 24, 1992. All of these cases were filed in Cook County Circuit Court. Friedman contacted the Cook County Sheriff for service of the summonses and complaints upon Tolentino, Brewer, and Johnson. After Friedman delivered the summonses and complaints to the Sheriff for service, Friedman mailed copies of them to these individuals in envelopes bearing the return address of Friedman's law firm. Also included in the envelopes, however, was a separately folded copy of a notice labeled "*IMPORTANT NOTICE*" (the "Notice"). This Notice read as follows:

> In the next few days it is likely that you will receive mail from lawyers recommending that the only way you can clean up your financial affairs is to file BANKRUPTCY, and that you employ that lawyer to represent you.
>
> As you know CREDIT is extremely important in this day and age. Filing bankruptcy is not necessarily the end to your financial problems. It might cause more problems than it solves. Bankruptcy may also involve COSTS to you such as filing, trustee and attorney fees.
>
> Your failure to pay your indebtedness to this creditor has prompted the filing of this legal proceeding against you. Though this action is unfortunate, it does not hinder your ability to discuss the payment of this debt on terms that everyone can live with.
>
> Please contact this office to discuss a repayment arrangement in line with your

financial situation. Please note that this office only represents the creditor and we cannot represent your interests in this matter.

Law Offices
LAWRENCE FRIEDMAN - 03532
19 S. LaSalle Street
10th Floor
Chicago, IL 60603
(312) 977-8000

On February 10, 1993, and February 16, 1993, respectively, Tolentino and Brewer filed the present lawsuits alleging that the Notice Friedman included with the copies of the summonses and complaints violated the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. §1692e(2), (9), (10), (11) and (13). Johnson was added as a named plaintiff in May 1993. The class action suit is premised on the theory that there exist many other previous debtors who received Friedman's Notice as part of his efforts to collect debts for various clients. The parties filed cross-motions for summary judgment on the issue of whether the Notice violates the FDCPA.

*DISCUSSION*

[1] Section 1692e of the FDCPA prohibits false and misleading representations or procedures in connection with debt collection. 15 U.S.C. §1692e. The FDCPA lists conduct that is in violation of §1692e, without limiting its general application. *See* 15 U.S.C. §1692e(1)-(16). The prohibitions listed include the false representation of the character, amount or legal status of any debt, 15 U.S.C. § 1692e(2)(A), the use of false representations or deceptive

means to collect or attempt to collect a debt, 15 U.S.C. §1692e(10), and "the failure to disclose clearly in all communication made to collect a debt ... that the debt collector is attempting to collect a debt and that any information obtained will be used for that purpose." 15 U.S.C. §1692e(11). The FDCPA also prohibits debt collectors from using documents or other communications which appear to be "authorized, issued, or approved by any court, official, or agency ... or which create[ ] a false impression as to its source, authorization, or approval," 15 U.S.C. §1692e(9), and prohibits debt collectors from falsely representing or implying that documents are legal process, 15 U.S.C. §1692e(13).

The issue in this case is whether Friedman's mailing of the Notice constitutes a debt collection activity which violates the FDCPA. For purposes of these motions, the parties have stipulated that Friedman is a debt collector covered by the FDCPA. See 15 U.S.C. §1692a(6). The court holds that the Notice is a deceptive means to collect or attempt to collect a debt in violation of §1692e(10) of FDCPA, and fails to clearly disclose that Friedman is attempting to collect a debt and that any information obtained therefore will be used for that purpose in violation of the §1692e(10). Furthermore, the Notice appears to be authorized, issued, or approved by a court and therefore creates a false impression as to its source, authorization, or approval in violation of 15 U.S.C. §1692e(9), and falsely implies that it is part of the legal process in violation of 15 US.C. §1692e(13).

Because the FDCPA's directives only apply to communication made to collect a debt, the principal question in this case is whether the Notice constitutes a communication intended for debt collection. The key to the answer to this

question converges on whether the action taken by Friedman constitutes a debt collection practice instead of a litigation practice.[6] Not all communications made to a debtor in regard to a debt are made for collection purposes. For instance, an attorney whose collection efforts render him a debt collector for purposes of the FDCPA is not collecting a debt at all times and not all activities undertaken on behalf of the creditor are to collect the debt. As defendant points out, Congress removed the attorney exemption in 1986 in order to "close a loophole which allowed attorneys engaging in unsavory debt collection activities to avoid liability ... simply because they had obtained a law degree." *Green v. Hocking*, 792 F.Supp. 1064, 1065 (E.D.Mich.1992).

But the Notice in this case is clearly an attempt to communicate to the debtors regarding the collection of the debts allegedly owed. The Notice is not a traditional legal activity. Even a non-attorney debt collector could send a copy of a summons, complaint, and Notice to debtor. Non-attorney debt collectors cannot, on the other hand, represent the creditor and file court documents on his or her behalf. Also, a summons and a complaint, as well as other legal documents filed in court, constitute traditional legal activities that may not be covered by the FDCPA because they are intended for use in litigation. But Friedman's use of the Notice is distanced from the traditional role of attorney as litigator an has the effect of advancing the financial interests of the creditors through possibly oppressive means. This

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[6]The Notice is clearly a "communication," which is "the conveying of information regarding a debt directly or indirectly to any person through any medium." 15 U.S.C. §1692a(2).

distinguishes the debt collection activity to which the FDCPA applies from the traditional litigation activities of an attorney to which Friedman argues the FDCPA does not apply. *Compare Graziano v. Harrison*, 950 F.2d 107, 109-13 (3d Cir. 1991) (FDCPA applied to attorney debt-collector's pre-litigation communications) *with Green*, 792 F.Supp. at 1066 (filing of complaints is purely a legal task that is not covered by FDCPA).

Friedman's argument that, once the suit was filed, Friedman's relationship changed such that he was now acting in a capacity that represented the creditors' legal interests and thus had the responsibility for successfully reducing the debts to judgment, and that the Notice was intended merely to effectuate a settlement, are without merit. The Notice itself discloses that Friedman was maintaining his attempt to engage in conversation regarding the collection of the debts without incurring any litigation expenses and was discouraging the debtors from filing a bankruptcy petition. The Notice reads, "Your failure to pay your indebtedness to this creditor has promoted the filing of this legal proceeding against you. Thought this action is unfortunate, it does not hinder your ability to discuss the payment of this debt on terms that everyone can live with." The Notice further requests, "Please contact this office to discuss a repayment arrangement in line with your financial situation." This language seeks to have the debts collected and payments made.

Additionally, the Notice is merely one step in Friedman's procedure for debt collection. It is apparent that Friedman's collection activity it comprised of a three step process that begins with persuasion by mail, it followed by the filing of suit and mailing of the Notice with the summons and complaint, which is last followed by the civil process. The court finds that the use of the Notice remains a part of

the debt collection activity of Friedman and is not part of the civil process.

The court now turns to whether the Notice violates any portion of the FDCPA. The Notice does not falsely represent the character, amount or legal statutes of the purported debts a is contemplated by §1692e(2)(A) of the FDCPA. The Notice does not make any representations on this topic. Actually, the Notice does not discuss any specifics regarding this debt. Therefore, the Notice does not violate §1692e(2)(A).

[2] Nonetheless, their Notice is deceptive. Section 1692e(10) requires that a debt collector's efforts not be deceptive to a "least sophisticated debtor." *Jeter v. Credit Bureau, Inc.*, 760 F.2d 1168, 1177 (11th Cir. 1985). The court should inquire into whether it is likely that the least sophisticated debtor who reads the Notice would take it to be oppressive, false, or threatening. *Bingham v. Collection Bureau, Inc.*, 505 F.Supp. 864, 871 (D.N.D.1981). If the Notice is deceptive as to whether collection efforts have ripened into a more serious stage or have progressed such that immediate action on the part of the debtor is necessary, then the practice could be deceptive with the meaning of §1692e(10). *See, e.g., Anthes V. Transworld Systems, Inc.* 765 F.Supp. 162, 168 (D.Del. 1991); *Graziano v. Harrison*, 763 F.Supp. 1269, 1279 (D.N.J.), *aff'd in part and rev'd in part*, 950 F.2d 107 (3d Cir.1991).

Friedman's Notice deceptively and misleadingly impresses upon its readers the belief that, because a lawsuit has been filed, they are now in a dire situation in which bankruptcy may appear to be the only viable option. The Notice implies that the only options are payment of the debt or bankruptcy, which would destroy the credit of the debtor.

Another manner in which the Notice i deceptive is as to its nature and source. An unsophisticated debtor may not realize the nature or source of the Notice, given its language and its inclusion with court documents, regardless of the sentence in the Notice identifying Friedman as representing the creditor. Section 1692e(9) prohibits any communication "which simulates or its falsely represented to be a document authorized, issued or approved by any court, official, or agency... or which creates a falsely impression as to its source,a authorization, or approval." 15 U.S.C. §1692e(9). And §1692(13) prohibits debt collectors from falsely implying that documents constitute legal process, 15 U.S.C. §1692e(13). The Notice gives the false impression to unsophisticated debtors that Friedman is, in some way, an attorney affiliated with the court or that he is required by the court to issue this Notice in connection with the summons and complaint. Also, the inclusion of the Notice with the summons and complaint implies that the Notice is part of the legal process of filing suit; and the Notices use of the words "this legal proceeding" implies that Notice is part of the legal process. Thus the oppressive and dire message conveyed by the Notice seems to be a message that is emphasized by a court.

Friedman argues that the subsections (9) and (13) apply to communications that physically and facially simulate forms or other official looking documents. These subsections are broader in application than Friedman claims. The statute refers to authorization or approval by a court--which may not necessarily come on officially forms and applies to documents creating a false impression, such as by implication through language or usage. Friedman's Notice is written in language that would seem official to an unsophisticated debtor an is included with legal process such that an unsophisticated debtor may take it as official sanctioned, authorized, or

approved. Friedman's practice is an attempt to clothe his collection efforts with official governmental or court authority and force. See *Colmon v. Payco-General American Credits, Inc.*, 774 F.Supp. 691, 699 (D. Conn. 1990).

Last, the Notice fails to disclose clearly that Friedman is attempting to collect a debt by this mailing and does not state that the information obtained will be used for that purpose. *See* 15 U.S.C. §1692e(11). The statute requires that this disclosure be made "in all communications made to collect a debt ..." *Id.* Friedman argues that subsequent communications with a debtor need not comply with §1692e(11) where previous communications complied with that section's disclosures requirement, citing to *Pressley v. Capital Credit & Collection Serv., Inc.*, 760 F.2d 922, 925 (9th Cir. 1985). This court does not adopt that position because the statute clearly states that *all* communications intended to collect a debt are covered, not just the initial ones. Further, the court is persuaded by the Fourth Circuit case of *Carroll v. Wolpoff & Abramson*, 961 F.2d 459 (4th Cir.), *cert. denied*, _____ U.S. ____, 113 S.Ct. 298, 121 L.Ed.2d 222 (1992). The reasoning of that decision comports more closely with the statutory language and recognizes the remaining possibility of over-reaching by debt collectors even after initial letters are sent which comply with the FDCPA. *See id.* at 461.

Requiring inclusion of the §1692e(11) language in the Notice would serve a beneficial purpose to debtors. The disclosure would definitely identify the documents as constituting a collection device rather than an officially-authorized or officially-required notice. The Notice's deceptive or oppressive nature would be cured by clearly delineating that the Notice remains a part of Friedman's attempt to collect a debt. Friedman cannot avoid liability by

simply including debt collection communications in mailings containing court documents. A different holding would allow Friedman to hide behind the characteristic that sets attorneys apart from other debt collectors, which arises from their law degrees; the ability to personally represent the creditor before the court and instigate a suit on its behalf.

*CONCLUSION*

For the reasons outlined above, the court grants the plaintiffs' motions for partial summary judgment and denies Friedman's motion.

IT IS SO ORDERED.

## APPENDIX C

RE:
Amount Claimed:
Account Number:

Dear

Please be advised that I have been retained by the above named, to represent them in their claim against you.

Be further advised that I have been instructed to initiate all necessary action in the enforcement of the claim, but before doing so, I am giving you this opportunity to pay this indebtedness without the necessity of filing suit.

If, however, I do not hear from you I may have no alternative but to commence legal action against you, which will greatly increase the amount due hereunder, by the addition of court costs and attorney fees, where applicable.

Unless you, the recipient of this notice, within thirty days after receipt dispute the validity of this debt or any portion thereof, the debt will be assumed to be valid.

If you notify the office of the undersigned, in writing within the thirty-day period that the debt, or any portion there is disputed, this office will obtain verification of the debt or a copy of a judgment against you and a copy of such verification of judgment will be mailed to you by the undersigned.

Upon your written request within the thirty day period, this office will provide you with the name and address the original creditor if different from the current creditor.

This letter is an attempt to collect a debt and any information obtained may be used for that purpose.

Very truly yours,

Lawrence Friedman

## APPENDIX D

## IMPORTANT NOTICE

In the next few days it is likely that you will receive mail from lawyers recommending that the only way you can clean up your financial affairs is to file BANKRUPTCY, and that you employ that lawyer to represent you.

As you know CREDIT is extremely important in this day and age. Filing bankruptcy is not necessarily the end to your financial problems. It might cause more problems than it solves. Bankruptcy may also involve COSTS to you such as filing, trustee and attorney fees.

Your failure to pay your indebtedness to this creditor has prompted the filing of this legal proceeding against you. Though this action is unfortunate, it does not hinder your ability to discuss the payment of this debt on terms that everyone can live with.

Please contact this office to discuss a repayment arrangement in line with your financial situation. Please note that this office only represents the creditor and we cannot represent your interests in this matter.

Law Offices
LAWRENCE FRIEDMAN - 03532
19 S. LaSalle Street
10th Floor
Chicago, IL 60603
(312) 977-8000

**APPENDIX E**

OUR FILE #151034

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
MUNICIPAL DEPARTMENT, FIRST DISTRICT

| | | |
|---|---|---|
| CITICORP NATIONAL SERVICES INC. F/K/A CITICORP ACCEPTANCE ASE OF BAY LEASING OF IL. CORP | ) | No. 92 M1-159891 |
| | ) | Amount. Claimed: $14,428.32 plus costs |
| Plaintiff, | ) | Return Date: 10/07/92 |
| vs. | ) | |
| ARSENIA TOLENTINO, | ) | CONTRACT |
| Defendant. | ) | |

VERIFIED COMPLAINT

The Plaintiff claims as follows:

1. That the Plaintiff is a Corporation licensed to transact business in the State of Illinois

2. That on or about January 27, 1992 the Defendant(s) herein contracted to lease certain personal property, a true and correct copy of said lease agreement being attached hereto as Exhibit A.

3. That on or about said date, said Lease and all rights and remedies therein were assigned to Plaintiff pursuant to a certain agreement, Plaintiff being the actual bona fide owner thereof.

4. That the Defendant(s) defaulted in the payments due Plaintiff pursuant to said Lease.

5. After allowing credits for all monies received, there now remains due and owing to Plaintiff the principle sum of 13,928.32 plus attorney's fees in the amount of 500.00 as provided in said Lease for the sum of 14,428.32.

6. Plaintiff further alleges that despite demand for payment, Defendant(s) has failed to do so.

WHEREFORE, Plaintiff prays for judgment against the Defendant(s) in the sum of $14,428.32 plus costs of suit.

I, LAWRENCE FRIEDMAN, on oath state that I am the Attorney for Plaintiff in the above entitled action. The allegations in this Complaint are true and correct to the best of my information and belief.

SIGNED AND SWORN
TO BEFORE ME
AUGUST 27, 1992.

_____
NOTARY PUBLIC

_____
LAW OFFICES
**LAWRENCE FRIEDMAN**

19 SOUTH LASALLE
10TH FLOOR
CHICAGO, ILLINOIS 60603
(312)977-8000